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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

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3 ROBERTO LOZANO, et al.

4 Plaintiffs,

5 v.

14 CV 2345 (GBD)

6 RUGFRIT 1350, LLC., et al.,

7 Defendants.

8 -----x

9 New York, N.Y.
September 4, 2014
11:30 a.m.

10 Before:

11 HON. GEORGE B. DANIELS,

12 District Judge

13 APPEARANCES

14 LEE LITIGATION GROUP, PLLC
15 Attorneys for Plaintiffs
16 BY: C.K. LEE

17 GORDON & REES, LLP
Attorneys for Defendants
18 BY: MARK A. BECKMAN
WILLIAM H. WEISMAN
19 VINCENT M. AVERY
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(Case called; in open court)

THE LAW CLERK: Will the parties please rise and make their appearances, starting with the plaintiff.

MR. LEE: C.K. Lee for the plaintiff.

THE COURT: Good morning, Mr. Lee.

MR. BECKMAN: Mark Beckman for defendants, your Honor.

THE COURT: Good morning.

MR. AVERY: Vincent Avery for defendants, your Honor.

MR. WEISSMAN: For defendant William Weisman.

THE COURT: Good morning, Mr. Weisman.

Mr. Beckman, do you wish to be heard on your motion?

MR. BECKMAN: I do indeed, your Honor. I did notice that prior counsel stood there.

THE COURT: It will be easier for the court reporter if you use the mic.

MR. BECKAN: No one ever claims they cannot hear me.

THE COURT: Hearing and understanding.

MR. BECKMAN: That's an excellent point.

Well, good morning, your Honor. We're essentially here today because plaintiffs has been overreaching a little bit and I think the motion papers make it clear and I think it is most important to begin on several of the issues related to in particular to the FLSA and federal claims and to the extent we have time later to perhaps also discuss the New York claims. Although, those are pretty clearly briefed.

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1 The bottom line here is plaintiff is essentially
2 arguing that there are two requirements of the FLSA and one of
3 which has not been met. Two requirements are that, one, you
4 have to give notice that you are taking the tip credit to your
5 tipped employees; and two, that the people who you are giving
6 that tip to or you are taking credit for are people who are
7 appropriately tipped employees, people who are customarily
8 receiving tips in that business and provide direct service to
9 the customers. Here they are really only making arguments and
10 the only thing pled into that complaint as to that first
11 requirement, whether notice as been properly given that the
12 employer is taking the tip credit for the tipped employee. As
13 the Court has seen there is no dispute that the defendant --
14 the plaintiff was notified in writing that the employer was
15 taking advantage of the tip credit. In fact, the plaintiff
16 signed a detailed explanation acknowledging he received it,
17 that he understood, and that he acknowledged the content of
18 that document.

19 Even if the face of that, defendant is essentially
20 making three arguments why that tipped credit notice is not
21 proper under the FLSA. First, he is saying that the
22 document -- the restaurant employee package didn't inform the
23 plaintiff of his overtime rate. That is from plaintiff's
24 opposition memo. Unfortunately for plaintiff that is not what
25 the FLSA requires. Under the FLSA all you have to do is

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1 provide the employee of the employer's intention to treat tips
2 as satisfying part of the employee's minimum wage requirements.
3 The document clearly does that. There is no allegation it
4 doesn't. Plaintiff is trying to conflate wrongly some of the
5 things that maybe wrong under New York or local law and that
6 simply is inappropriate and does not exist here. That is
7 plaintiff's first argument.

8 Plaintiff's second argument says under the FLSA the
9 notice was entirely in English even though plaintiff identified
10 his primary language was Spanish and that is somehow improper.
11 Plaintiff then cites a slew of cases supposedly supporting that
12 proposition. Unfortunately every single one of those cases is
13 different in a material way from the case before you now,
14 namely, everyone of those cases plaintiff specifically alleged
15 in the pleadings that they neither read, understood, or spoken
16 English. That simply is not the case here. Here the plaintiff
17 both signed and read -- read and signed the document saying he
18 had received that notice and acknowledged that he understood
19 that notice. Secondly, there is no allegation in the complaint
20 that plaintiff could not understood, speak or read English.
21 Essentially plaintiff is making a statement without any basis
22 whatsoever that the employee and has no authority for the
23 proposition that where the employee has signed an
24 acknowledgment and where the employee does not allege they
25 cannot speak read or understand the notice that that notice is

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1 invalid.

2 THE COURT: Is there a paragraph in the complaint that
3 makes this claim?

4 MR. BECKMAN: Pardon me?

5 THE COURT: Is there a paragraph in the complaint that
6 makes that claim?

7 MR. BECKMAN: No. It does not exist.

8 The third and final argument, which has equally failed
9 in this collection is that plaintiff argues that the notice he
10 received was invalid "because it does not inform the tipped
11 employee that he or she is entitled to retain all tips received
12 except pursuant to a valid tipped pooling arrangement required
13 by the FLSA." That third and final argument is wrong for three
14 independent sufficiently -- independent and sufficient bases.
15 First, that is the first time we have heard about it in their
16 opposition memo. None of that was pled in the complaint.
17 There is nothing in the pleading about this claim at all. You
18 cannot raise a new claim in an opposition to a motion to
19 dismiss.

20 Second, even if it had been in the complaint, the
21 requirement they are referring to is a safeguard against an
22 employer wrongly dipping into the tip pool. That is not
23 alleged here and that is not what is going on here. There is a
24 protection for the employee that if management or some other
25 representative of the employee takes some of the tips, but that

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1 is not the case here and that has not been alleged.

2 Third and finally, this requirement is there to in
3 fact protect tip pooling arrangements under the FLSA. It says
4 that we can in fact "retain all tips received except pursuant
5 to a valid tip pooling arrangement." Here there is no
6 applicability because first there was a valid tip pooling
7 arrangement; and two, this person, particular plaintiff was not
8 the kind of person who received direct tips from customers. He
9 wasn't a waiter. He wasn't a bartender. He was a busser. He
10 was never actually handed any tip ever. There is no allegation
11 he was ever handed a tip, ever. There is no allegation he was
12 ever handed a tip. There is no allegation that he didn't
13 actually receive all of the tips through that tip pooling
14 arrangement. Not one occasion has been identified, not one
15 occasion has been alleged where he received a tip or that tip
16 was somehow taken away from him or that that tip was not
17 obligated to be put into the pool like all other tips.

18 In the end, all he is alleging is that the defendant
19 did not provide him with a notice of the right he didn't get in
20 the first place. He did not participate in a pool -- sorry.
21 He did participate in a pool and he did not receive tips
22 directly from the customer. In short in this respect the
23 defendants have advised the plaintiff at the start of his
24 employment that they were taking the tip credit. They gave him
25 a detailed explanation of that, he signed it, he acknowledged

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1 it, and he read it and understood it. He has not asserted
2 anything in the complaint that indicates he couldn't read that
3 document or that he didn't understand it. Essentially,
4 plaintiff has failed to state a claim understood the FLSA for
5 the tip notice.

6 Plaintiff's second complain is with respect to the tip
7 pooling itself, the process of tips being pooled so that all
8 employees share. Here they are saying the valid tip pool under
9 the FLSA is based on the one allegation in the complaint, and
10 just one, where the plaintiff was forced to participate in that
11 tip pool, the pool which was created prior to his employment
12 and still exists subsequent to his employment. Unfortunately
13 under the FLSA, and frankly under the New York Labor Law as
14 well, employers are perfectly well in their right to create and
15 establish mandatory tip pooling. They don't need to receive
16 the voluntary participation of an employee. They simply have
17 to do the tip pool within the bounds of the law, which they did
18 here. There is a slew of cases, which we cited, and we have
19 more we can produce.

20 In short the bottom line is plaintiff here is trying
21 to challenge the existence of the rule and cites one case to do
22 it. Shear v. Food Scope America. Unfortunately for plaintiff,
23 though, the proposition there is really not applicable here
24 because there the Court said, Yes, that was an invalid tip pool
25 because you had management dipping into the pool. You had

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1 people who were not properly nonexempt, people who were not
2 tipped employees taking a piece of the pie. That is not the
3 case here nor has it been alleged here. That is materially
4 different. Here all that they are alleging is that the
5 plaintiff didn't actually raise his hand and say, Yes, I want
6 to be in the tip pool. Plaintiff doesn't have the right to say
7 yes or no. Plaintiff is told there is a tip pool and is
8 explained how it works and plaintiff has to participate like
9 every other tipped employee. Here he only personally alleges
10 that he didn't agree to the pool. Sadly that is just not the
11 law. So again that claim doesn't give rise to -- that
12 allegation doesn't give rise to a claim and that must be
13 dismissed.

14 Finally, there is really no protection afforded to the
15 plaintiff here based on the documents that have been provided.
16 And there has been some discussion in the papers the Court does
17 have the right and the Court should and must look at the
18 documents that were provided, among them the exhibits showing
19 exactly what the plaintiff saw when he was hired, what he was
20 provided during his employment. Those are all absolutely
21 integral to the case. The reality is plaintiff is saying he
22 was not given proper notice. The documents we have attached
23 were the notices. It is like saying, We're going to serve a
24 breach of contract; but, please, don't look at the contract.
25 Here plaintiff is trying to say, Well, don't look at that or

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1 use those. In reality there could be nothing more integral to
2 a claim for lack of proper tip notice than the notice the
3 plaintiff received and signed.

4 Finally, your Honor, to the extent plaintiff is
5 suggesting that the -- pardon me.

6 THE COURT: I have two questions. I wasn't sure what
7 the nature of the overtime dispute was. There is some
8 reference to overtime that I am not sure if there is a claim of
9 not paying overtime.

10 MR. BECKMAN: Well, they are saying because they did
11 not receive notice of the tip credit that invalidates the
12 taking of the tip credit, which means they are then entitled to
13 overtime based on the minimum wage they would have received for
14 those hours they can no longer claim from the tip. All of that
15 stems from that.

16 THE COURT: I want to make sure I understand. There
17 is no additional claim that given that the employee worked
18 overtime and that the employer did not pay for that overtime?

19 MR. BECKMAN: That's not alleged in the complaint. It
20 has not been raised, even though it would be improper to raise
21 later in opposition. All of it flows from the basic premise
22 that in theory the plaintiff wasn't -- did not receive proper
23 notification. As we have described, he did.

24 THE COURT: I assume that the process is even with the
25 tipped credit for the standard 40 hours or whatever is the rate

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1 and then time and a half for overtime?

2 MR. BECKMAN: Yeah. That's correct.

3 THE COURT: No dispute there wasn't a different rate?

4 MR. BECKMAN: No. In fact, Exhibit C, which is the
5 wage notice, it says it will be 8.35, or whatever it is, which
6 is the time and a half. So he was informed of that and that is
7 how it was done. There is no allegation anywhere in the
8 pleadings that there is anything wrong with that. It all flows
9 from the one mistaken argument that somehow he was due other
10 things from his notice than he actually received. He just
11 wasn't. He got everything he was supposed to get.

12 THE COURT: Tell me what is the nature of Exhibit C?

13 MR. BECKMAN: That is the Wage Prevention Act form. I
14 believe it's the fifth document. A is the stuff he got from
15 the restaurant. That is there proprietary package of
16 information.

17 THE COURT: A is the notice?

18 MR. BECKAN: C are the pay charts from ADP.

19 THE COURT: When you say the "pay charts," the pay
20 charts retained by the employer or the pay charts provided to
21 the employee?

22 MR. BECKMAN: We don't have access to the employee's.
23 These are the ones that were retained by the employer.

24 THE COURT: Is there a question or dispute of whether
25 there were wage statements provided to the employee?

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1 MR. BECKMAN: I don't think so, but my understanding
2 is that it is not the same format. These are reports that ADP
3 provides to the employer, which is a different form of the
4 report provided to the employee with their check. I don't
5 think there is a dispute what we provided is what plaintiff
6 received albeit in a different piece of paper.

7 THE COURT: It wasn't clear to me from the complaint
8 or from the briefs of whether or not there was a dispute or
9 whether or not there were regular wage statements provided to
10 the employer.

11 MR. BECKMAN: Remember, your Honor, that is not a
12 requirement of FLSA. To the extent that would or would not
13 have been something that would be contested -- I don't think it
14 is. I am sure. None of that is relevant to the FLSA claims.
15 That may or may not be relevant to the New York Labor Law
16 claims.

17 THE COURT: What do you say I should do with the New
18 York Labor Law?

19 MR. BECKMAN: I think you should dismiss those as
20 well. I didn't have much -- we thought we did a particularly
21 good job in the papers.

22 THE COURT: It is unclear to me what the nature of the
23 counts, the separate counts are in the complaint. You believe
24 that all claims are dismissed based on these arguments?

25 MR. BECKMAN: I do. Look, I am a pretty blunt guy. I

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1 think some are stronger or better or closer. Yeah, I think we
2 have a much clearer argument on the FLSA claims. I think the
3 New York law is a little bit amorphous. I still think we win
4 for the reasons we put in our brief. It couldn't be clearer to
5 me that certainly under the federal claims, under the FLSA --
6 it is a no-brainer, your Honor.

7 THE COURT: I am trying to splice out this separate
8 claim. How do you articulate the New York Labor Law claims as
9 different claims than Fair Labor Standards Act? What do you
10 think is being alleged under the New York Labor Law?

11 MR. BECKAN: Well, I don't want to speak for
12 plaintiff.

13 THE COURT: Right.

14 MR. BECKMAN: The claim he has alleged --

15 THE COURT: What do you think you are being given
16 notice of? What violation do you think you are giving notice
17 of?

18 MR. BECKAN: I think the reality for the New York
19 Labor Law claims is that he is claiming that parts of the wage
20 notice weren't complete such as the amount of overtime
21 required. Essentially the things he is trying to claim in the
22 FLSA, which aren't applicable maybe applicable under the New
23 York Labor Law. I don't think so, but that is the argument he
24 is claiming.

25 THE COURT: That is why I asked about the wage

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1 statements. That is what would be in the wage statements?

2 MR. BECKMAN: Yes.

3 THE COURT: So what ways is there a dispute about
4 whether the wage statements provided to the plaintiff were
5 adequate?

6 MR. BECKMAN: They say that there is not all the
7 information required there. I think what they are trying to
8 claim in the wage statement for just the New York Labor Law
9 claims is that the way they derive overtime each week was not
10 included in the wage statement. There are similar arguments on
11 the tip notice; but in just the New York law my understanding,
12 and I am sure I will be corrected, is that the real difference
13 is they are saying in these wage statement claims the amount of
14 overtime that would be given -- again, if you invalidated the tip
15 pole because the lack of proper notice -- the amount of
16 overtime they got every single paycheck wasn't given as a line
17 item in the wage statement account. I think that is what he is
18 trying to say.

19 THE COURT: What do you say was provided in the wage
20 statements?

21 MR. BECKMAN: If you look you will see there is a line
22 that says, Tip, OT tip.

23 THE COURT: I want to make sure I understand the
24 notations.

25 MR. BECKMAN: We think it does provide all of that.

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1 THE COURT: You believe that it provides what?

2 MR. BECKMAN: The hourly rate, the overtime rate, what
3 they received during the time period.

4 THE COURT: Give me an example.

5 MR. BECKMAN: Hold on one second and I will turn to
6 the exhibit.

7 THE COURT: I didn't understand all the columns.

8 MR. BECKMAN: Frankly, we're not so sure either. I
9 may be the wrong guy to ask that particular question.

10 THE COURT: I said columns, not problems.

11 MR. BECKMAN: Oh, right.

12 THE COURT: You have the gross wages.

13 MR. BECKMAN: If you look, say, to the third column in
14 it says earnings. You have reg tip, OT tip.

15 THE COURT: Reg tip would be?

16 MR. BECKMAN: Reg tip is the regular hourly pay. You
17 see that says \$5. Minimum wage minus the 2.25. That is the
18 tip credit amount. Then you see OT tip, which would be the
19 5-dollar amount for time and a half, which is the overtime
20 amount.

21 THE COURT: I see.

22 MR. BECKMAN: Next to it you have the hours worked
23 that week both for the reg tip, which is for overtime and so
24 forth. So this provides everything we think we need to
25 provide.

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1 THE COURT: What are the other notations. Min tip,
2 what is that?

3 MR. BECKMAN: Honestly, your Honor, I am not exactly
4 sure.

5 THE COURT: Add tip?

6 MR. BECKMAN: May I confer with my colleague for a
7 moment, please?

8 THE COURT: Yes.

9 (Pause)

10 MR. BECKMAN: My understanding min tip stands for what
11 the minimum amount would be that they would have to
12 additionally pay the plaintiff if for whatever reason the
13 amount of tips he received was below the minimum wage amount.
14 So the company would give him more money to make sure he
15 received at least the minimum wage. As you see that didn't
16 happen. At the end you see that that is the spread of hours, I
17 believe.

18 THE COURT: When you say that didn't happen, I have
19 107.84 in that column. It looks like it did happen.

20 MR. BECKMAN: I am sorry. I apologize. I misspoke.
21 Right. Min tip is the amount that is between them add tip
22 would be the amount they need to pay to do that. As you see
23 they did do that. I misspoke. Min tip is the amount between
24 the minimum wage and what they actually received. Add tip is
25 what the company threw in. Ad tip is what they actually

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1 received.

2 THE COURT: I don't understand why the min tip would
3 be 107 and add tip would be 192?

4 MR. AVERY: Your Honor, my understanding is that the
5 minimum tip line item is essentially the difference between the
6 post-tip credit hourly rate and the minimum wage. In effect,
7 what conceptually we would need to make up. The amount of tips
8 the employee would need to receive. The add tip is what the
9 employee actually received.

10 THE COURT: So that if the min tip had been more --
11 well, the responsibility is to make sure that the add tip is at
12 least what the min tip is --

13 MR. AVERY: Exactly, your Honor.

14 THE COURT: -- would have been. The hourly rate is
15 the 7.25?

16 MR. AVERY: Right.

17 THE COURT: Minimum wage?

18 MR. AVERY: Correct.

19 THE COURT: The reg tip is what the rate is to--

20 MR. BECKMAN: That is the hourly rate but that takes
21 advantage of the 2.25 tip credit.

22 THE COURT: Which basically means that they pay the
23 5-dollar hourly rate in conjunction with the tips, the regular
24 tips that they would be receiving at least \$7.25?

25 MR. BECKMAN: That's correct, your Honor.

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1 THE COURT: The OT tip means that they would have to
2 make time and a half so it would be \$8.62.

3 MR. BECKMAN: That's correct.

4 THE COURT: And that that would be the amount that
5 they had to be paid in order for the rate and the tips to equal
6 time and a half --

7 MR. BECKMAN: That's correct.

8 THE COURT: -- at minimum wage?

9 MR. BECKMAN: That is the floor essentially.

10 THE COURT: Right.

11 MR. BECKMAN: Again, as we said that is purely the New
12 York Labor Law side. So I am loathe to speak for plaintiff,
13 but that is our understanding what they are claiming.

14 THE COURT: I will talk to Mr. Lee, but I am not sure
15 what is the dispute about what you think they say is missing.

16 MR. BECKMAN: Okay.

17 THE COURT: Can you tell me what you think they say is
18 missing?

19 MR. BECKMAN: I think what they are saying is that the
20 way the overtime each week was calculated, meaning the hours in
21 any particular week was derived, those were the weeks they
22 derived is missing.

23 THE COURT: What is missing?

24 MR. BECKMAN: The way the calculation -- the wage --
25 the calculation of that 2.25 each week is being taken and how

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1 the overtime is being derived. Again, I am a little bit
2 confused about it myself.

3 THE COURT: Let me hear from Mr. Lee.

4 MR. BECKMAN: Thank you, your Honor.

5 MR. LEE: Thank you, your Honor.

6 THE COURT: Go to the podium and start over.

7 MR. LEE: Good morning, your Honor. I think the
8 issues here are actually really simple and Mr. Beckman's
9 confusion in interpreting the defendant's earning statement
10 reflects how notice is improper in this case. So I just wanted
11 to address the issues that has been most recently raised about
12 the invalid earning statement. Under the New York Labor Law an
13 employee is required to receive the wage statement, otherwise
14 known as a pay stub, that informs him of a number of specific
15 items that the law details one of which is supposed to tell a
16 person the amount of the tip credit that is claimed for the pay
17 period. That claim is specifically stated in the complaint
18 under paragraph 26, subparagraph II which says, The defendants
19 failed to provide a proper wage statement informing tipped
20 employees of the amount of tip credit taken for each payment
21 period.

22 THE COURT: Isn't the math simple enough from that
23 statement?

24 MR. LEE: No.

25 THE COURT: If you subtract the hourly rate from the

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1 additional pay, that's the tip credit, isn't it?

2 MR. LEE: Yes and no, your Honor.

3 THE COURT: Is it more complicated than that?

4 MR. LEE: It is more complicated. Because the earning
5 statement itself is confused. The earning statements says his
6 pay rate is \$5.

7 THE COURT: Right.

8 MR. LEE: His pay rate is not \$5. His pay rate is
9 actually 7.25. The company is claiming an allowance on his
10 compensation. That is what is not being disclosed to the
11 employee. So the employee looking at this document just says
12 Mr. Beckman himself was confused and your Honor had a difficult
13 time differentiating the various columns. This wage statement
14 is difficult for sophisticated lawyers to review. It's next to
15 impossible for a layperson who is not educated what is going
16 on.

17 THE COURT: You are only attacking one issue on this
18 wage statement. First of all, you are not claiming that he
19 didn't get a wage statement.

20 MR. LEE: That's correct.

21 THE COURT: You are claiming that this wage statement
22 doesn't say for each pay period exactly how much of the pay,
23 the gross pay, is the tip. That's your only complaint.

24 MR. LEE: No. There are a few things, your Honor.
25 The first thing is that they got his pay rate wrong. His pay

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1 rate is 7.25.

2 THE COURT: It says 7.25. The bottom line says 7.25.

3 MR. LEE: That is regarding to his payment for spread
4 of hours. That is three days of spread of hours' compensation.
5 That is what they are paying him for that. That is actually
6 confusing also because it says three under "hours," but it
7 actually is intended for three spread of hour payments. When
8 an employee works a workday that exceeds 10 hours a day in New
9 York, they have to be compensated and extra hour of pay.

10 THE COURT: I understand that. The rate of pay is
11 clearly \$7.25. That is the hourly rate of pay. That's the
12 minimum wage. Every employee knows that is the minimum wage
13 because every employee gets a form telling them that is the
14 minimum wage and telling them that is what they are entitled
15 to. It is on the wage statement that 7.25 is the rate that you
16 are going to be paid for that hour.

17 MR. LEE: Well, it says regular tip says \$5.

18 THE COURT: Right. Regular tip rate.

19 MR. LEE: Well, your Honor --

20 THE COURT: That's clearly explained in Exhibit 1.

21 MR. LEE: But, your Honor --

22 THE COURT: It is explained that the formula for this
23 is federal minimum hourly wage \$7.25 minus tip credit equals
24 your hourly wage. Being provided that information and given
25 each one of those numbers, what is it that you are not being

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1 told?

2 MR. LEE: First of all, your Honor --

3 THE COURT: Are you saying if the person is not good
4 at math, they cannot figure out how much of the pay that period
5 went to the tip and how much of it was part of the 5-dollar
6 rate?

7 MR. LEE: Well, there is a couple problems, your
8 Honor. Let me back up a little bit. We're arguing a lot of
9 the substance on this case. That is okay. I don't mind doing
10 that but--

11 THE COURT: I am not arguing the substance. I am
12 trying to figure out what your allegation is. That is not what
13 you say in your complaint. You don't say that specifically in
14 your complaint. I am giving you an opportunity to explain to
15 me what you really mean. That is not what is in the complaint.
16 It doesn't say that. It simply says they didn't give me proper
17 notice. I am trying to figure out in what way you have alleged
18 that in the facts. I don't want to get into this, but this is
19 not in your complaint so you don't get the benefit of this
20 explanation if you don't want to discuss what you really mean
21 by these allegations.

22 Let me ask one really important question to start
23 with. Your complaint has nothing to do with any other
24 deficiency other than the notice. Would that be a correct
25 statement?

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1 MR. LEE: No.

2 THE COURT: You are not saying that if proper notice
3 was given that they somehow violated the labor laws, if there
4 was proper notice. You don't claim they under paid anybody if
5 they had proper notice. You don't claim that they are not
6 paying the overtime if they gave proper tip notice. You are
7 not complaining that they are stealing the tips. If they had
8 given proper notice everything that you paid your employee, you
9 are not saying there was anything wrong with what they paid out
10 if they had given the proper notice; is that correct?

11 MR. LEE: I think the notice issue is --

12 THE COURT: Answer that question first.

13 MR. LEE: If --

14 THE COURT: Answer that.

15 MR. LEE: It is not the only issue.

16 THE COURT: What other thing are you saying that they
17 did that is not dependent on whether or not the notice was
18 proper?

19 MR. LEE: For example, the tip pooling arrangement was
20 improper because there was something that was mandated by the
21 company, right, and it was not something that was agreed upon
22 by the plaintiffs.

23 THE COURT: What case law says that the employee who
24 gets hired by the employer gets to come in and say, You can't
25 have a tip sharing arrangement unless I agree to it personally?

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1 Where do you get that?

2 MR. LEE: Sure.

3 THE COURT: My understanding of the law is the
4 opposite. If the employee shows up and says, I want to work
5 here as a busboy, and if the employer says, Okay, I want you to
6 know that this is the way you are paid, that busboys will
7 get -- I would otherwise have to pay you \$7.25 an hour, but we
8 have a tip sharing arrangement here so that your base rate is
9 going to be \$5 an hour and the additional tips that you are
10 going to share in is going to take you above \$7.25 and I am
11 letting you know that. So if you want to work here, that is
12 the wage you are going to be paid. You are not arguing that
13 the employee can say, I am going to take the job but I am not
14 going to agree to be paid that way.

15 Is that your argument? I never heard that.

16 MR. LEE: No. The argument about the tip pooling is
17 that in a tip pool the employees themselves are supposed to
18 agree upon the tip sharing arrangement in regards to, for
19 example, who gets what percentage of the allocation of the
20 tips. Now, the employer is not supposed to mandate that. It
21 is something that the employees themselves are supposed to
22 agree upon.

23 I will give you an example. There are situations
24 where -- there are two types of tip a arrangements in a
25 restaurant. I used to work in a restaurant. So we would call

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1 it -- it was a Chinese restaurant so I will translate it
2 loosely. One arrangement is a capitalist arrangement and
3 another is a socialist.

4 THE COURT: I understand.

5 MR. LEE: The capitalist arrangement: You serve a
6 customer, you get the money. The socialist arrangement is
7 pooling. So if a restaurant is mandating a tip pooling
8 arrangement and mandating who gets what percentage, at least my
9 understanding of the law, it's not valid.

10 THE COURT: Where do you get that understanding?

11 MR. LEE: For example, under the Shear case, 297
12 F.R.D. 114, 125 (S.D.N.Y. 2014), it cites a New York Department
13 of Labor opinion RO-08-0049, and it the quote is "For a
14 voluntary tip pooling arrangement to exist, it must be
15 undertaken by employees on a completely voluntary basis and not
16 be mandated or initiated by employers and then employers can
17 take no part in the organization or the conduct of the tip
18 pool."

19 THE COURT: So what are you alleging happened here?

20 MR. LEE: So what I am alleging happened here is that
21 the employers, they set the tip pool, they set the point
22 system, and everybody just had to do that, and that is invalid.

23 THE COURT: What do you base that allegation on? You
24 are saying that, and I will take it whether or not separately
25 whether or not it can be a "voluntary pool." You are not

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1 saying that every single employee that if your client objects
2 that there cannot be a tip pooling arrangement even though all
3 the other employees agree. You are not saying that?

4 MR. LEE: Well, what I am saying is --

5 THE COURT: You have to answer my question. You are
6 not saying that your client gets a veto over whether or not the
7 other employees will have a tip sharing arrangement?

8 MR. LEE: Sure.

9 THE COURT: He does? Wait a minute. I want to make
10 sure I understand you. You are telling me that if before your
11 client gets there there are 10 employees and all 10 employees
12 agree to a tip sharing arrangement, your client shows up, your
13 client is hired to work, he knows the employees are already
14 agreed to a tip sharing arrangement, and he says, I don't like
15 that arrangement, no more tip sharing now that I am a worker
16 here, do you think he has a right to do that, that he can veto
17 the tip sharing arrangement? I will change the numbers. There
18 were nine and now he is the 10th employee. Nine employees
19 agree there will be tip sharing arrangement, your client says
20 he doesn't agree so the employer has to dissolve the
21 arrangement?

22 MR. LEE: That is not my argument. The issue is who
23 the employees are agreeing with.

24 THE COURT: The employees, other than your client, is
25 forced into a tip sharing arrangement; is that what you are

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1 claiming?

2 MR. LEE: The issue is this --

3 THE COURT: You keep saying the issue.

4 MR. LEE: Do I know if other people disagreed? I
5 don't know if other people have disagreed.

6 THE COURT: How can you make an allegation that it is
7 an illegal tip agreement being forced upon them if you can't
8 say the majority of the employees didn't agree to it?

9 MR. LEE: Because there was something that was
10 mandated by the employer.

11 THE COURT: Why do you say that? You don't know
12 whether the employees agreed to it. How do you allege it was
13 mandated by the employee?

14 MR. LEE: My plaintiff told me.

15 THE COURT: Told you what.

16 MR. LEE: The employer set the tip pool.

17 THE COURT: How does he know that? I assume there was
18 a tip pool before he got there.

19 MR. LEE: Sure.

20 THE COURT: How does he know that? Is he saying the
21 employer forced that on employees and the employees didn't
22 agree to this?

23 MR. LEE: Well --

24 THE COURT: That is what forcing means?

25 MR. LEE: I will give you an analogy, your Honor.

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1 Let's say I have an office and I tell all the employees you
2 have to have lunch at 1:00. That is mandated by me.

3 THE COURT: It depends on whether all the employees
4 say that is when we want to have lunch. If they say that is
5 when we want to have lunch, it is not being forced.

6 MR. LEE: That is the difference between me saying,
7 all you people you eat lunch at 1:00.

8 THE COURT: So you are alleging that the employees
9 didn't agree to the tip credit?

10 MR. LEE: What I am alleging --

11 THE COURT: You have to allege that, don't you? You
12 can't say they forced that on them. You have to say the
13 employees did not agree to share their tips in this manner,
14 that even though they didn't agree to it, the employer made
15 them do that. That is not what you are saying.

16 MR. LEE: Well, what I am saying is the employer
17 established the tip pool.

18 THE COURT: Did the employees agree to it?

19 MR. LEE: Well, the employers are not supposed to
20 establish a tip pool. They are not supposed to have anything
21 to do with the tip pool.

22 THE COURT: You can't have it both ways. You cannot
23 say they have nothing to do with it but the employee is the one
24 who did.

25 MR. LEE: The employers are not supposed to do

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1 anything regarding the tip pool. They are not supposed to set
2 it. They are not supposed to take part in it. They are not
3 supposed to mandate it or initiate it.

4 THE COURT: The employer?

5 MR. LEE: Yes. The employer is not supposed to do
6 anything regarding the tips. That is something that --

7 THE COURT: That is what I am trying to understand.
8 Are you trying to say the employees did not agree to the tip
9 pool?

10 MR. LEE: That's right.

11 THE COURT: What makes you say that?

12 MR. LEE: Because it was mandated by the employer.

13 THE COURT: Tell me in what way it was mandated by the
14 employer.

15 MR. LEE: They said -- waiters have to be -- tipped
16 employees share the tips.

17 THE COURT: That is what they told your client when he
18 arrived because there was already a tip pool in effect?

19 MR. LEE: That was said by the employees.

20 THE COURT: How do you know that?

21 MR. LEE: That's an issue of fact.

22 THE COURT: Who says that? What is your good-faith
23 basis to allege that before your client got there and knew
24 anything that what was going on in the restaurant what
25 knowledge does he have to allege that prior to his arriving

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1 there that the employer forced these employees before he got
2 there to participate in a tip pool?

3 MR. LEE: When he arrived to work, his employer told
4 him how he was allocated his tips.

5 THE COURT: That would be the case whether or not they
6 agreed to it or when he got there? Even under your scenario if
7 you said five years ago my client didn't work there, five years
8 ago all the employees got together and said we want to do a tip
9 pool and they all agreed to that, five years later your client
10 shows up, what is your client going to be told by the employer?
11 Your client is going to be told exactly what he was told.
12 There is a tip pool here and you have to participate in it and
13 this is what the tip pool is.

14 MR. LEE: That is different, your Honor.

15 THE COURT: How is that different?

16 MR. LEE: Then if your scenario is correct then he
17 shows up at work and he is informed by the tipped employees
18 what the tip pool arrangement is. He is going to work and he
19 is being told by his employer that is what was mandated and
20 that is what he needs to follow.

21 THE COURT: He can say who it was mandated by. The
22 tip pool was in effect when he arrived. So it is obviously
23 something he has to participate in, isn't it? As I say they
24 cannot nine employee who agree to a tip pool and your client
25 shows up and the employer says, Look, you are showing up and

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1 there is a tip pool here and this is how you get paid, and he
2 can say, No, I am not going to accept that and you have to
3 dissolve the tip pool. Your client doesn't have the right to
4 do that. Your client has the right to say I understand there
5 is a tip pool. I want to participate. I want to get employed
6 and I am going to join the tip pool because that is the way
7 everyone gets paid. It doesn't tell me one way or another
8 whether it was forced on the employees. What basis do you say
9 it was forced on the employees? Would you recognize and
10 concede there was a tip sharing arrangement prior to your
11 client arriving?

12 MR. LEE: Sure.

13 THE COURT: How does your client know how it was
14 created?

15 MR. LEE: Your Honor --

16 THE COURT: What allegation can you make on his
17 personal knowledge or any knowledge about whether or not it
18 was -- when was created and how it was created and by whom it
19 was created?

20 MR. LEE: Well, I guess the issue would be if he comes
21 to work and the tip pool is not something that is mandated by
22 the employer but just mandated by his coworkers that everybody
23 else had agreed to, then it is a coworker arrangement.

24 THE COURT: What would be employer have said
25 differently? We have a tip pool and you have to participate?

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1 MR. LEE: No. The alternative -- that is one scenario
2 and the employer says he goes in and he understand that is the
3 tip pooling arrangement that has been set by--

4 THE COURT: The employer has an obligation to say
5 something. That is the whole premise of your complaint. The
6 employer has an obligation to tell him when he arrives that,
7 look, there is a tip pool and we're going to take the tip
8 credit. This is how you are going to get paid. We have the
9 right because there is a tip pool if we give you the proper
10 notice to take the tip credit against the minimum wage. That
11 seemed to be saying in this complaint. Leave aside the
12 arguments in the paper, in this complaint you seem to allege
13 that your client -- let's move onto the main issue. You claim
14 that your client was not given notice that the employer was
15 going to take the tip credit. That is the primary claim in
16 your lawsuit.

17 MR. LEE: Yes.

18 THE COURT: They have produced a document signed by
19 your client which acknowledges that they are notifying him of
20 the tip credit. My position is very simple in light of that
21 document, it is not a plausible allegation for him to make that
22 he was never notified of the tip credit. He has got to explain
23 how it is that he claimed that he was not notified about the
24 tip credit when you -- are you denying that that is his
25 signature on the form?

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1 MR. LEE: I am not.

2 THE COURT: You have to give me under *Iqbal* and
3 *Twombly*, a plausible -- if you are not denying he received and
4 signed this document, then it is not a plausible allegation
5 that he did not receive the notice.

6 MR. LEE: I can go through the exhibits.

7 THE COURT: No. I want you to go through your
8 complaint. You cannot simply say he didn't receive the notice
9 because now you are saying you he didn't deny receiving the
10 notice.

11 MR. LEE: I understand. I wanted to refute the
12 invalidity of the documents they produced.

13 THE COURT: You are right that I am not here to debate
14 the document. Your task is very simple. If you have a
15 different plausible explanation of why you claim that he didn't
16 receive notice when you are standing here acknowledging that he
17 received this document and signed this document, then you need
18 to put that allegation in the complaint. You cannot just say
19 to me, I don't deny that he received this notice, I don't deny
20 that he signed receipt of this notice, but I am going to allege
21 in my complaint that he never received a notice. That is not a
22 plausible allegation in light of what you just conceded to.
23 You have to explain to me in what way you are claiming he
24 didn't receive notice if in fact you are acknowledging that he
25 did receive the written notice and that he signed the receipt

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1 of the written notice.

2 MR. LEE: Sure. So for example one of them is undated
3 and the second one is dated on 2013 so he started his
4 employment in October 2012.

5 THE COURT: That doesn't tell me whether he received
6 notice. It may say something about when he received notice.
7 You don't claim that when he came to you -- let me say it
8 differently. In what way do you claim that when he came to you
9 and said, Oh, I want to sue them, that he was unaware that he
10 had inadequate notice of what the proper procedures would be?

11 MR. LEE: Well, here is the reality, your Honor, most
12 clients that come to me are not educated and they don't speak
13 English.

14 THE COURT: That's not what you allege in this
15 complaint. That is the problem. You hit it right on the head.
16 You don't allege, one, that he doesn't speak English. You
17 don't allege, two, that he didn't understand it. You don't
18 allege, three, that he didn't read it. You don't say that at
19 all. You don't say anything about that. Let put it this way:
20 You know I cannot assume based on that that if there is written
21 notice in English, plain English, and he signs receipt of that
22 notice and you acknowledge that he received it and he
23 acknowledged receiving it, you cannot make an argument that I
24 am supposed to assume that somehow he got inadequate notice
25 because he is speaks another language; right?

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1 MR. LEE: Well --

2 THE COURT: Are you claiming he doesn't read English?

3 MR. LEE: Yes.

4 THE COURT: Well, you don't claim that in this
5 complaint. That is fatal to your complaint. Even if your
6 papers you don't say that he didn't speak English. You say
7 that his native language was Spanish.

8 Is English your native language?

9 MR. LEE: It is not any native language.

10 THE COURT: Why should I assume that you don't
11 understand English? You know that is not a reasonable
12 assumption to make. You are a very articulate, fluent person
13 in English. Just because you say to me your native language is
14 not English, there is no assumption that I am supposed to make
15 even if that was in the complaint, which it is not, there is no
16 assumption that I am supposed to make that if I give you a
17 document to sign in English that somehow I am supposed to
18 assume that you don't understand it.

19 MR. LEE: They actually provided his notice in
20 Spanish, one of them. Their Risk Preventative Act is the
21 Spanish version. They recognize this person is a nonEnglish
22 speaker.

23 THE COURT: No. They recognize he is a Spanish
24 speaker. Your client doesn't communicate with you in English?

25 MR. LEE: That is correct. I have a translator.

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1 THE COURT: You clearly are not making the allegation
2 that he didn't receive a notice. You are making the allegation
3 that he didn't receive adequate notice because they gave him
4 the notice in English?

5 MR. LEE: That's correct.

6 THE COURT: That's a different set of allegations.
7 That is not what is in your client. Your complaint says he
8 received no allegation. Nobody gave him anything. So you have
9 to give me a different complaint. That is not true. You just
10 acknowledged to me what you said in the complaint.

11 MR. LEE: I understand.

12 THE COURT: The basis of your claim that he didn't
13 receive notice is not true. It is not a plausible allegation
14 because it is not true.

15 MR. LEE: I understand, your Honor, but here is the
16 reality of working with many of these individuals --

17 THE COURT: I know the reality.

18 MR. LEE: They don't remember. They don't remember
19 what they signed.

20 THE COURT: Not remembering is not a basis on which
21 one can sue. If I don't remember who ran me over with a car, I
22 can't pick anybody off the street and say I want to sue you.
23 You have to give me some factual allegations based on what you
24 do know. What we don't know are things that we don't
25 experience personally and things that we cannot remember. So

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1 if you tell me that he doesn't know it or can't remember it,
2 then you don't have a sufficient basis for him to make a
3 good-faith allegation to that effect.

4 MR. LEE: Your Honor, that is what discovery is for.

5 THE COURT: No. That is not what discovery is for.

6 MR. LEE: People remember certain things and then --
7 because defendants are supposed to the ones that keep all the
8 documents. The employee has nothing.

9 THE COURT: Tell me what the nature of your allegation
10 is with regard to proper notice? If it is not as you allege
11 that he never received any notice, is what you think that you
12 can base your claim on is the notice they gave him was not in
13 Spanish so that is what makes it inadequate?

14 MR. LEE: That is one of them, your Honor. The other
15 one is that the defendants did not inform the plaintiff that he
16 is entitled to keep all the tips except those shared in a valid
17 tip arrangement. That is under Reyes v. Sofia Fabulous Pizza
18 Corp.

19 THE COURT: You are not making an accusation that they
20 skimmed his tips?

21 MR. LEE: I am not saying that.

22 THE COURT: You are not making an accusation that he
23 didn't receive all of his tips?

24 MR. LEE: That's right. It is a notice requirement.

25 THE COURT: So you are saying that even though they

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1 did nothing wrong in terms of distributing the tips because
2 they didn't tell him specifically you really are receiving all
3 the tips you are entitled to then that is fatal to the notice
4 and they can sue him for a wage violation.

5 What else would be entitled to in terms of wage? You
6 are not saying that he didn't receive adequate wages. You want
7 to say that the wages he received are not adequate because they
8 didn't give him the proper notice.

9 MR. LEE: That's right.

10 THE COURT: If they had given him the proper notice
11 you are saying there is nothing they did wrong in terms of what
12 they paid him, how they paid him, they weren't cheating him out
13 of money. If this notice was adequate, is there anything that
14 they did was wrong?

15 MR. LEE: Except for the tip pooling. There were also
16 claims for --

17 THE COURT: I am not sure what your other claims are
18 the way you laid it out.

19 MR. LEE: There was also --

20 THE COURT: You say violation Count One is a violation
21 of the Fair Labor Standards Act. That does not tell me the
22 nature of the violation. In what way do you say they violated
23 the Fair Labor Standards Act?

24 MR. LEE: Well, again, it is the tip notice, right, is
25 a federal violation.

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1 THE COURT: Well, they gave tip notice.

2 MR. LEE: Invalid tip notice.

3 THE COURT: In what way was it invalid?

4 MR. LEE: Because they didn't properly inform him of
5 what his overtime tip credit rate was.

6 THE COURT: Where is there a requirement that they
7 specifically inform them of the overtime rate? If you tell me
8 that the hourly rate is \$7.25 and they give you an example that
9 the formula for the hourly rate 7.25 minus the tip credit
10 equals your hourly wage so if your hourly wage is \$7.25, the
11 tip credit if it is turns out to be \$2.25, your hourly rate
12 will be \$5. If you understood this form --

13 MR. LEE: Which one are you referring to?

14 THE COURT: Exhibit A. If your client understood
15 English and read this form, it informs him that the minimum
16 wage is \$7.25 an hour, is it your argument that it is
17 inadequate notice unless it informs him of what his overtime
18 hourly rate is?

19 MR. LEE: He has no idea what his hourly time rate is.

20 THE COURT: Where do you get that? What requirement
21 in the of Fair Labors Standards Act say that you have to spell
22 out --

23 MR. LEE: I think all employees you have to tell them
24 their regular rate and overtime rate for all employees.

25 THE COURT: But you are claiming that he wasn't

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1 informed that he was going to get time and a half.

2 MR. LEE: He would have no idea what his rate is, your
3 Honor.

4 THE COURT: I am asking you first before you get to
5 the rate, you are not claiming that he didn't understand that
6 he was going to get time and a half of overtime. You are just
7 arguing that he didn't know what was where he was going to come
8 out?

9 MR. LEE: They don't tell him.

10 THE COURT: He didn't know he was going to get time
11 and a half of overtime?

12 MR. LEE: Honestly, your Honor, before I did this, I
13 used to work in a big law firm, I had no idea what overtime
14 was.

15 THE COURT: I am not asking you about you. I am
16 asking you what your clients knew.

17 MR. LEE: My secretaries used to tell me about getting
18 overtime pay and I was like whatever.

19 THE COURT: That doesn't mean your employer had wage
20 violations. You want to make it a federal lawsuit. That's the
21 difference. You may not have understood it. I may not
22 understand it as well. That is not the point. The point is
23 what is the legal requirement of the employer. I know of no
24 legal requirement that says that with regard to the tip credit
25 that it's required that you tell them both what the hourly rate

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1 is, what the overtime rate is and what the holiday rate is with
2 regard to giving them information about what would entitle the
3 defendant to the tip credit. What entitles the defendant to
4 the tip credit is notice that they are going to take the tip
5 credit, that there is a pool and that the pool as long as the
6 base wage and the tips add up to more than the hourly rate that
7 meets our requirement with regard to paying a minimum wage so
8 therefore that means we get the "tip credit." What other
9 requirement is there in order for them to take the tip credit
10 with regard to overtime?

11 MR. LEE: Your Honor, in regards to the overtime issue
12 about the amount of disclosure required to an employee, I
13 understand what you are saying in reference to where they
14 mention 7.25 minus the 2.25 tip credit so your regular hourly
15 rate is \$5. I am saying --

16 THE COURT: Even you and I can understand that.

17 MR. LEE: Yes. I also understand your Honor's
18 discussion regarding the overtime rate basically a person can
19 say, okay, I will get time and a half on my hourly.

20 THE COURT: You don't have to be a rocket scientist.

21 MR. LEE: But you need to be a rocket scientist
22 because it is confusing. Your regular Joe on the street when
23 he sees that his regular hourly rate is \$5 and his grandmother
24 and uncle is telling you should get overtime on that, he is
25 thinking he should get 7.50. That is the wrong rate. He

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1 should be 7.25 times 1.5, which is 10.88 minus the 2.25.

2 THE COURT: You are absolutely right. If they are not
3 paying you that, you have a lawsuit. If they are paying you
4 that, you don't have a lawsuit simply because nobody told you
5 that the overtime rate is, whatever, \$12.30.

6 MR. BECKMAN: The other way, \$8.30. You reduced it.

7 THE COURT: Well, that's not true. I am talking about
8 the overtime rate without a tip credit.

9 MR. BECKMAN: 10, your Honor.

10 MR. LEE: 10.88 minus 2.25 so it is 8.26.

11 THE COURT: Right. You may have an overtime violation
12 if I am not told that I get time and a half and I don't receive
13 time and a half; but you don't have a Fair Labors Standard
14 violation with regard to the tip credit simply because you
15 didn't put in your notice what the number was for overtime. I
16 never heard that argument.

17 MR. LEE: Again, your Honor, their notice is undated
18 and second notice is dated.

19 THE COURT: You don't say that negates the legitimacy
20 of the notice?

21 MR. LEE: It is totally effective from when they
22 provide that notice. To let's say in 2012 he didn't receive
23 any notice in 2012 then.

24 THE COURT: When do you claim that he received the
25 notice?

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1 MR. LEE: I don't know when he received it. He didn't
2 think he ever received it. There is a notice here and only one
3 of them is dated February 2013. It is an issue of fact.

4 THE COURT: What difference does it make? The problem
5 is what difference does it make? You don't claim a wage
6 violation. You don't claim that he didn't receive notice. Now
7 you want to argue that, well, because it is undated, we don't
8 know when he received it. Let's put it this way: You would
9 acknowledge that you don't have a claim on the timing after the
10 period of time that he received the notice.

11 MR. LEE: I still think it is invalid. We have a --

12 THE COURT: It is not invalid. I don't have to
13 consider the timing of it. You can't argue today that because
14 he didn't receive the notice on day one, he has got a claim
15 today. He did receive notice. We know at least he received
16 notice as of which date.

17 MR. LEE: 2013.

18 THE COURT: How far back are you trying to go?

19 MR. LEE: He started his employment in October 2012.

20 THE COURT: October 2012 to when?

21 MR. LEE: He worked until May 23rd.

22 THE COURT: See the problem is that that your argument
23 cannot morph. That is not what you say in your complaint. If
24 you want him to say that I didn't receive notice until X date,
25 then that's fine. Let's debate about whether or not about the

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1 time that he was paid that he didn't receive the notice that
2 timing is important. You have to acknowledge that unless he
3 says that -- quite frankly, I am not sure that you have a
4 timing argument regardless. Your arguments would be valid
5 arguments if the plaintiff was inadequately paid under a tip
6 credit. You don't say he was inadequately paid if the tip
7 credit applied. You are trying to say the tip credit doesn't
8 apply because these are the technical things that they didn't
9 do in order to notify him appropriately.

10 MR. LEE: That's correct.

11 THE COURT: And timely.

12 MR. LEE: That's correct.

13 THE COURT: So you don't have a compelling a case as a
14 person that says, you know what, these guys haven't even been
15 paying me the rate. They have been paying me an inadequate
16 rate. They are taking the tip credit but there is no tip
17 credit to take because they were not getting those tips, or
18 some argument that they are being paid inadequately. You don't
19 say that if they give the proper notice, you don't say that
20 your client should have been paid any differently than how he
21 was paid if he had proper notice.

22 MR. LEE: Well, I do have I call-in pay, which is that
23 he would be sent home without his pay if they weren't busy.

24 THE COURT: I am not sure --

25 MR. LEE: Paragraph 30, your Honor.

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1 MR. BECKMAN: I don't mean to interrupt, but we didn't
2 move on that part of the motion, your Honor.

3 THE COURT: That is why I asked you originally and
4 that was the thrust of my question whether you say you were
5 moving to dismiss all claims. You said yes and now you are
6 telling me no.

7 MR. BECKMAN: I apologize. I forgot.

8 THE COURT: What else is left?

9 MR. BECKMAN: That was the only other claim.

10 THE COURT: So that is why I asked that question.

11 MR. LEE: I have one more thing, which is the wage
12 statement. Even though your Honor and I differ on the
13 interpretation of the wage statement and whether it is
14 corrected notice for the amount of tip credit, they don't
15 provide the address of the employer, which is something that is
16 supposed to be provided.

17 THE COURT: Wait a minute. You are telling me there
18 is a requirement that if I don't put on the wage statement the
19 address of the employer then I am not entitled to the wage
20 credit?

21 MR. LEE: Then you get a penalty of up to \$2,500.

22 THE COURT: Penalty?

23 MR. LEE: Up to \$2,500. That's the not a tip credit
24 claim. That's a separate claim.

25 THE COURT: That money isn't paid to the employee, is

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1 it?

2 MR. LEE: It is paid to the employee.

3 THE COURT: Paid to the employee for what because you
4 didn't put the address of the company?

5 MR. LEE: Yes.

6 THE COURT: What claim is that?

7 MR. LEE: That is under the Wage Theft Prevention Act.

8 THE COURT: What claim is that in the complaint?

9 MR. LEE: Under paragraph 29.

10 THE COURT: Where does it say that? It is not in
11 paragraph 29.

12 MR. LEE: It just said it doesn't provide a proper
13 wage statement.

14 THE COURT: It says it doesn't provide a proper wage
15 statement in these ways. You never say you are claiming that
16 they didn't put the address of the employer on the actual
17 claim. I am hearing this for the first time. That isn't in
18 this complaint. They failed to satisfy the requirement under
19 New York Labor law because such tip credit was never included
20 in any wage statement to tip employees. Defendants also failed
21 to provide proper wage notices in the beginning of employment
22 of plaintiff and class members and annually thereafter. Those
23 are the ways that you said they did that. You didn't say they
24 didn't put the address of the employer and that is what I am
25 suing them for. Is that what you meant?

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1 MR. LEE: What I meant is to include any inadequate --

2 THE COURT: You would agree that you cannot say that
3 they violated the New York Labor Law these three ways and then
4 say that at the end of this case you want to prove that they
5 did it in seven other ways. You can't do that. You have to
6 make a factual allegation to you put them on notice.

7 MR. LEE: I understand.

8 THE COURT: In what way you have put them on notice
9 that you are assuming they didn't put the address.

10 MR. LEE: I am letting them know that the wage
11 statement is not proper for whatever reason.

12 THE COURT: I don't know if you are suing them because
13 it was typographical error that you say is improper. You have
14 to allege a fact. You can't say it was improper. You say ways
15 that you say it is improper. You don't say anything about an
16 address.

17 MR. LEE: I understand, your Honor. One other point
18 which is the last sentence of the same paragraph 29. It says,
19 Defendants failed to provide proper wage notices at the
20 beginning of employment of plaintiff and annually thereafter.
21 So at the very least that claim also holds water because based
22 on their dating of the Wage Deprivation Act notice it was in
23 the middle of his employment period.

24 THE COURT: I am trying to understand if it is your
25 position -- I don't understand that to be the law. It is your

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1 position that if I started on January 1st --

2 MR. BECKMAN: May I say something, your Honor.

3 THE COURT: No. I started on January 1st. I didn't
4 get the notice. I got the notice March 1st. I also worked for
5 five more years. You are saying that that totally negates my
6 being able to take the credit for any period of time?

7 MR. LEE: Well, it at least negates it for the first
8 two months.

9 THE COURT: That's a different argument. That is not
10 the argument you made here. If you want to say it negates it
11 until you got it, that is one thing but you don't even say you
12 got it. You got to give me something that tells me why your
13 client is saying that he didn't get notice if I have a notice
14 and didn't give timely notice. If you have a notice that he
15 signed, you have to give me some explanation for that in the
16 complaint.

17 MR. LEE: I understand. Can I also just address one
18 more point, your Honor?

19 THE COURT: Yes.

20 MR. LEE: The final point, and your Honor had a
21 different interpretation as I did in regards to the earning
22 statements, as a matter of public policy it is important that
23 an employee knows what he is getting paid. It is important for
24 him to know what is being taken out of his pay stubs. So the
25 policy has always been if you are going to deduct something

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1 whether it is a housing allowance or meal allowance or a tip
2 credit allowance, the employee has to know what is being
3 deducted from his compensation. Just like when you are working
4 at a company and they take tax withholdings, you need to know
5 what you are getting paid.

6 THE COURT: Mr. Lee, isn't it clear from this document
7 that what is being deducted from his pay is \$2.25?

8 MR. LEE: Well, it is not clear.

9 THE COURT: Tell me any other interpretation of what
10 was deducted from his pay. If his base rate is \$5, the minimum
11 wage is 7.25, isn't it clear that they are talking \$2.25 from
12 his base rate?

13 MR. LEE: It may be.

14 THE COURT: Is there any other possibility?

15 MR. LEE: Your Honor, it may be clear or it may not be
16 clear, but that is kind of a subjective argument.

17 THE COURT: Well, no, it is not a subjective argument
18 if that is what the wage statement says.

19 MR. LEE: The form doesn't say that. The form that
20 they provided to the Court by the way, your Honor, is a
21 summary, an earning summary that the employee does not see. So
22 what the Court is looking at is something that the employee
23 never received.

24 THE COURT: That is why I asked you. I asked you
25 whether there was a dispute whether or not he received periodic

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1 wage statements and you said no.

2 MR. LEE: There is not a dispute that they received
3 pay stubs.

4 THE COURT: It says the rate is \$5; right?

5 MR. LEE: That's right.

6 THE COURT: The minimum wage is 7.25.

7 MR. LEE: It doesn't say his minimum wage rate. It
8 doesn't say that.

9 THE COURT: It does. It says the hourly rate is 7.25.
10 It said in the form that he signed when he first came to work.
11 Are you claiming that he was never notified or knew that the
12 minimum wage rate was 7.25? Because that is what the form says
13 when he was handed it, whenever he was handed it.

14 MR. LEE: Again, he doesn't speak English.

15 THE COURT: That doesn't tell me whether he knows he
16 did not notify him or whether he didn't know the rate. It says
17 7.25. You say this is the rate for what column?

18 MR. LEE: For the spread of hours.

19 THE COURT: Spread of hours?

20 MR. LEE: Yes.

21 THE COURT: Is there any reason to believe that the
22 spread of hours rate is different than the hourly rate?

23 MR. LEE: He could be paid \$8.

24 THE COURT: How would the hourly rate be 7.25.

25 MR. LEE: He might be confused.

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1 THE COURT: You didn't say he was confused. You said
2 he wasn't notified. It says that it is 7.25. The hourly rate
3 is 7.25. When he first received the form, it says the hourly
4 rate of 7.25. Is there reference to any other hourly rate
5 other than 7.25?

6 MR. LEE: Yeah. It says \$5 an hour.

7 THE COURT: That's the rate that they paid him the tip
8 rate. So you say the problem is that they don't tell you how
9 much money they are withholding. They are withholding the
10 2.25, and \$5 which is 7.25; right?

11 MR. LEE: Yes. The only thing is the clarity. I
12 guess the issue of debate is the clarity of the disclosure. My
13 position is that at very least --

14 THE COURT: You say his damages are what?

15 MR. LEE: The damages?

16 THE COURT: Tell me what his damages are. Are you
17 saying he just worked so now you want to totally negate any tip
18 credit and make them have to pay the base rate of 7.25 and now
19 give him the difference between \$5 and 7.25?

20 MR. LEE: That's right.

21 THE COURT: You are saying they are doing that
22 because -- you are not accusing them of that. Your argument
23 are pretty technical.

24 MR. LEE: They are pretty technical.

25 THE COURT: From the cases I have seen, and I have

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1 seen a lot, this is not the most egregious violation that you
2 or I have seen.

3 MR. LEE: I understood.

4 THE COURT: I have seen some places and you have seen
5 them too, particularly restaurants where the clients are simply
6 totally abused. The employers keeping that knowledge away from
7 them, employers intimidating them, employers not paying them
8 the rate even under a credit, or the employer surreptitiously
9 skimming it or improperly taking the credit without the
10 employees knowing. You don't accuse them of doing any of those
11 bad things.

12 MR. LEE: That's correct. In terms of the wage
13 statement what they should be doing is let's say they made a
14 thousand dollars this week, they should have told them, We're
15 deducting 2.50 so you are getting 5.50 for your comp. He needs
16 to know the amount of credit as being claimed for that period
17 just as he knows --

18 THE COURT: Again, I don't know whether or not you are
19 not raising the issue whether or not the information on here is
20 the same information he received. I didn't think that that was
21 in dispute. It says his cash pay is \$275.55. It says that his
22 reg tip pay is \$200. What is missing?

23 MR. LEE: What is missing is the amount of allowance
24 that is being claimed so 2.25 times 40 plus.

25 THE COURT: The amount of the allowance is the

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1 difference between 200 and 275; right?

2 MR. LEE: I don't think so.

3 THE COURT: What is the allowance? You mean the tip
4 credit?

5 MR. LEE: It would 2.25 times 47.93. It's \$107.

6 MR. BECKMAN: And 84 cents.

7 THE COURT: That is right on there.

8 MR. LEE: But --

9 THE COURT: It says 107.84.

10 MR. LEE: But nobody knows what that is. His rate is
11 not \$5.

12 THE COURT: That's the minimum tip rate.

13 MR. LEE: His rate should be 7.25.

14 THE COURT: You just gave me a number that says he
15 wasn't informed of it and it is right on the form. Is it the
16 exact number? You are not saying they didn't give him that
17 number. Now you are saying they didn't explain it to him
18 adequately. What else is on here that should be on here?

19 MR. LEE: Well, nobody knows. They actually explained
20 minimum tip as something different earlier. They don't even
21 know what it is. I don't know what it is.

22 THE COURT: What other number do you say should be on
23 this form is not on this form because the number you gave me is
24 on this form?

25 MR. LEE: But nobody knows what that number means.

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1 THE COURT: That is a different question. That is a
2 different question. You first said that they didn't inform him
3 and I say well what didn't they inform him. You said, The
4 difference. I said, What should they have told him? Then you
5 said, \$107. Then I said, They did say it is \$107.

6 MR. LEE: What they should have done is multiply his
7 gross pay by 7.25 and then subtracted out the credit allowance.

8 THE COURT: Tell me what number would have shown up on
9 a wage statement that is not here?

10 MR. LEE: His gross pay.

11 THE COURT: Gross pay. Isn't that \$275.95?

12 MR. LEE: I am not sure.

13 THE COURT: I am not saying what is not on this form
14 that legally they were required to put on this form and if they
15 didn't put it on then you get to get back all of the tip
16 credit. This is not the strongest argument. Tell me what
17 number is missing?

18 MR. LEE: The number that is missing is \$376.

19 THE COURT: How do you get 376?

20 MR. LEE: 7.25 times 40 and you take 10.88 times 7.93.

21 THE COURT: Right.

22 MR. LEE: So the first number is 298 plus 86 and that
23 gets you to 376.

24 THE COURT: So you are saying they should have added
25 the 275.85 to the 68.40 and given him another number?

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1 MR. LEE: They should tell him what his gross pay is.

2 THE COURT: That is what his gross pay is. His gross
3 pay is 275.65 plus 68.40; right? That's the number you gave
4 me; right?

5 MR. LEE: I don't think those numbers match, your
6 Honor.

7 THE COURT: That is the number you gave me.

8 MR. LEE: The number 376.28.

9 THE COURT: 376, where did you get that number?

10 MR. LEE: 725 times 40 plus 10.88 times 7.93.

11 THE COURT: No. That is not the right number.

12 MR. LEE: That is the overtime hours. It's 1.5 times
13 7.25 times the number of hours.

14 THE COURT: No. They gave him 8.6250 as the overtime
15 rate.

16 MR. LEE: Oh, yeah.

17 THE COURT: He worked 793 hours and they paid him
18 68.40 overtime on top of the.

19 MR. BECKMAN: Your Honor, may I make one comment?

20 THE COURT: Putting aside that I was terrible at math
21 and so I am will be useful to the calculation portion, I think
22 it is important to note that this entire set of calculations in
23 this discussion is really irrelevant because there is no
24 requirement under FLSA or to the New York Labor Law for
25 anything that he is asking for in any of these calculations.

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1 Wage statement requirements even under the New York Labor Law
2 do not require this kind of calculation and expression. This
3 is all one big red herring and a long, long trip down the
4 rabbit hole. We are not required under any regulatory scheme
5 for any employer to do any of this. This is just extra stuff
6 he would like there to be. There is no law anywhere that says
7 you have to place the overtime calculations the way he is
8 describing in the document, the pay stubs or the wage
9 statements. It doesn't exist.

10 I would like to point your Honor to the regulations.
11 Page 9 of our brief -- page 8 and the regulation says,
12 Employer, one, may require a food services employee to
13 participate in the pool; and two, as you were discussing with
14 him, the wage statement has the numbers that both FLSA and the
15 New York Labor Law requires. This is not required by anything.
16 So I don't mean to interrupt the discussion of which numbers
17 are right, but it is all a bit of a wasted effort.

18 MR. LEE: Your Honor, it is not. It is required. I
19 can even give you the case cites. I will provide it to the
20 court. Under Padilla --

21 THE COURT: What does it say?

22 MR. LEE: It says an employer may validly take a tip
23 credit only if the employer provides wage tickets for each pay
24 period showing the amount claimed as part of the minimum way.

25 THE COURT: Why isn't this showing me the allowances

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1 claimed?

2 MR. LEE: It doesn't say anything about tip credit
3 allowance.

4 THE COURT: Tell me the allowances claimed on that?

5 MR. LEE: The allowances claimed would be, for
6 example, if you look at right-hand column it says "deductions,"
7 you see that is where the tip credit allowance should be.

8 THE COURT: I don't understand what number you are
9 saying. What is the allowance?

10 MR. LEE: I will use easy numbers, your Honor.

11 THE COURT: Tell me here. I want to see if that
12 number exists.

13 MR. LEE: They should be multiplying 7.25 times 40
14 plus 10.88 times 7.93. That would get you his gross pay.
15 Under deductions they should multiply 2.25 times 47.93 and that
16 would show the amount of the deductions as being taken for this
17 pay period. They don't do that.

18 MR. BECKMAN: Your Honor, the case he just cited
19 doesn't in fact require any type or any particular type of
20 calculation. It just said it has to provide the information
21 that is being provided here. He is saying, well, this manner
22 or that way of saying it is better or worse. That is not what
23 the law or even the case he is citing says. The information
24 has to be there. As your Honor has said on a dozen occasions
25 today, it is in these forms and information he received. He is

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1 trying to impugn incredibly hyper-technical requirements that
2 don't exist under the federal or state. The going back and
3 forth on the math on requirements that don't exist don't seem
4 like a good use of our time.

5 THE COURT: Anything further?

6 MR. LEE: No. It is something I think is very clear,
7 your Honor. Your regular Joe employee who has never gone to
8 college or even high school is getting a slip of paper that OT
9 tip, min tip and he has no idea what that means.

10 THE COURT: Why should I assume that is your client?
11 He could be a MIT graduate. I am not supposed to make these
12 kind of assumptions about who your client is or whether he
13 understood or what he knew. I don't know how sophisticated or
14 unsophisticated he is.

15 MR. LEE: I will save everybody some time and I am
16 happy to amend the complaint and make it more specific in light
17 of all the stuff we talked about.

18 THE COURT: Mr. Lee, I am going to give you that
19 opportunity. I will grant their motion to dismiss this
20 complaint. I think this complaint is inadequate on what is the
21 primary allegation that your client didn't have notice at all
22 they were going to take a tip credit. It is clear that you got
23 to give me a different explanation about why you say he didn't
24 know this. Because it is not because they didn't give him
25 something that clearly could have told him that.

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1 MR. LEE: Understood.

2 THE COURT: So if you have some further allegations to
3 make with regard to that, I am going to allow it. I am going
4 ahead to give you leave to amend. I am going to dismiss this
5 complaint.

6 MR. LEE: Sure.

7 THE COURT: To the extent that you re-allege or if you
8 intend to re-allege some of the related state claims, I will
9 let that supersede this and we'll proceed on the new complaint.
10 The question is whether these Fair Labor Standards Act claim
11 proceeds and what is the actual nature of the state law labor
12 law violations that you are alleging based on what facts, what
13 inadequacies that you are alleging.

14 MR. LEE: Sure.

15 THE COURT: Your allegation is that they didn't do --
16 I forget what the one we were discussed that is not in the
17 complaint. If they didn't do X, you will have to say they
18 didn't do X. You cannot say they violated the New York Labor
19 Law and I will tell you later how they did it. Tell me exactly
20 what you say makes them liable under the labor law, what
21 inadequacy exists. I thought I knew what you were saying. I
22 will give you leave to amend.

23 With that I want a letter, nothing more than a letter,
24 justifying and clearly citing to me statute, section, or
25 quotation of case law or reference to specific lines in cases

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1 that would support the requirements that you are trying to put,
2 how technical requirements you are trying to put upon the
3 defendant, concerns of whether or not the notices are adequate
4 or inadequate.

5 MR. LEE: Okay.

6 THE COURT: Convince me that everything that they need
7 to sit down and give them a volume of material to try to make
8 sure that they analyze every which way the numbers that he is
9 giving as I say the simple math is supposed to tell you is
10 proper and timely then, look, this is how it works. 7.25 minus
11 tip equals the amounts that we're going to pay you, the rate
12 we'll pay you. If you have a problem with that, you let us
13 know. If the employee thinks you are not being paid that, you
14 should let the employer know and say, Wait a minute, my pay is
15 not what you said it was supposed to be given the notice that
16 you gave me.

17 So I don't find that a lot of these points that you
18 are making are compelling to say if that is the only deficiency
19 then that means that we tossed the baby out with the bath water
20 and they don't get a tip credit because they didn't put a
21 certain analysis or reference in a particular note. So give me
22 the proposed amended complaint. Give it to me within 30 days.
23 I will give you that much. You can give me an explanation why
24 you think it is adequate and why you realize what you allege
25 and what you allege is new. If you want to reference that in

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1 your letter, I will give them an opportunity to respond and I
2 will see if that is adequate. At this point you have to
3 clearly -- both sides have to clearly designate the claims that
4 are still in dispute. I will let those claims go forward to
5 the extent I understand what is still in dispute. To the
6 extent that you can address the issues that we discussed and
7 the other side can make their point as to why it is inadequate.

8 MR. BECKMAN: Your Honor, I want to understand the
9 procedure. Are you contemplating that plaintiff provides you
10 with a letter and we respond to that letter and he puts in the
11 proposed complaint?

12 THE COURT: Absolutely not. I am contemplating within
13 30 days I will get a proposed amended complaint and a letter
14 explaining to me why this has addressed my concerns and how it
15 addresses the deficiencies that I found in his complaint. You
16 can respond to that within 14 days. Look at that complaint and
17 look into what explanations he has given and why those facts
18 make it inadequate. You can respond to that and say, No, this
19 is no good because there is not such a requirement and/or the
20 allegations that he made are not plausible allegations to make.
21 As I say, I need some further allegations with regard to the
22 plaintiffs. You have to say something about the notice I
23 received.

24 MR. LEE: Understood.

25 THE COURT: You cannot ignore it. Look, I cannot

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1 accept a set of allegations that clearly are inconsistent with
2 the real world facts. You are in a situation now that you have
3 to explain away that notice. You cannot just ignore it.

4 MR. BECKMAN: Understood, your Honor.

5 THE COURT: I cannot accept a good-faith plausible
6 truthful allegation that he received no notice. You cannot
7 just say that. I guess you can if you can explain to me even
8 though his signature is on it and it is or is not his
9 signature, then he signs something in blank, they gave him a
10 piece of paper and it it was in English and he signed it
11 anyway. Give me some plausible explanation. This is not one
12 of those cases where the employer has surreptitiously cheated
13 the employees. That is not the nature of your claim.

14 MR. LEE: That's right.

15 THE COURT: If you want to be technical about it, I
16 will hold you to the technical requirements. If you are right
17 technically they violated the law based on the facts that you
18 allege then the case goes forward and those claims go forward.
19 You will have to demonstrate to me that is truly the
20 requirement and that you truly articulated the deficiency and
21 in the notice and the knowledge that was required to be given
22 to your client by the employer.

23 MR. LEE: Thank you, your Honor.

24 THE COURT: I think we have a date. February 12th is
25 the next calendar date. I will leave the next date on. The

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1 next conference is February 12th. When I get this in the next
2 30, 45 days, I will go ahead and rule one way or another
3 whether or not the claims are sustainable and then you can go
4 forward with discovery. You can talk about that anyway because
5 it sounds like there will be some minor claims that are going
6 to remain. Obviously if the major claims go away, it may be a
7 case that is worth a quick settlement discussion.

8 MR. BECKMAN: Does your Honor contemplate oral
9 argument on the next proposed amended complaint?

10 THE COURT: No, I do not. Make sure your letters
11 clearly indicate how you say that it makes this complaint
12 sufficient and how you say it clearly is still insufficient.

13 MR. BECKMAN: Will do.

14 MR. LEE: Thank you, your Honor.

15 MR. BECKMAN: Thank you, your Honor.

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